

44. (New) The cream composition of claim 27, wherein the cream still contains living lactic acid bacteria at a concentration of over 10^6 /gram of the food composition after being chilled for 45 days.

C3 45. (New) A hermetically closed plastic sachet comprising the cream composition of claim 26.

5003 46. (New) A food product comprising the cream composition of claim 26 disposed between two layers of biscuit.

REMARKS

Claims 26-36 and 38, as amended, and new claims 39-46 are pending in this application for the Examiner's review and consideration. Applicants appreciate the courtesies extended to Applicants' attorneys Jeffrey A. Wolfson and Matthew R. Osenga by Examiners Milton I. Cano and Robert A. Madsen during an interview conducted on April 24, 2002. The comments appearing herein are substantially in accordance with those presented and discussed during the interview. Although the Amendment After Final filed March 20, 2002 was not entered, Applicants understand from the Advisory Action mailed April 9, 2002 and the interview that all rejections will be withdrawn except the final obviousness rejection. Applicants also understand new rejections may be imposed if new art is uncovered in a search or as a result of the Amendment.

The specification was amended to correct a typographical error. Claim 26 has been amended to require the presence of the various optional ingredients that were previously recited in claim 38, as well as to incorporate the features of claim 37. Claim 37 was canceled without prejudice. New claims 39-41 recite optional fruit that may be included in the composition (*See, e.g.*, Specification, page 5, lines 21-27). New claim 42 recites that the cream composition has a water activity of 0.86 to 0.91 (*See, e.g.*, Specification, page 6, line 26). New claim 43 recites that the composition is aerated with about 25 ml to 150 ml of an inert gas per 100 grams of cream (*See, e.g.*, Specification, page 6, lines 33-37). New claim 44 recites that the cream still contains living lactic acid bacteria at a concentration of over 10^6 per gram of the food composition after being chilled for 45 days (*See, e.g.*, Specification, page 10, lines 18-21). New claim 45 recites a hermetically closed plastic sachet that includes the cream composition of the present invention (*See, e.g.*, Specification, page 9, lines 20-21).

New claim 46 recites that the cream composition is between two layers of biscuit (*See, e.g.,* Specification at page 7, lines 1-4). No new matter has been added by way of these amendments, such that their entry at this time is warranted. A marked up version of the amended paragraph of the specification is attached as Appendix A. A marked up version of the amended claims is attached as Appendix B. A clean set of the pending claims is attached hereto as Appendix C.

Claims 26-27, 29-34, and 36 were rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,175,013 to Huang et al. ("Huang") as evidenced by Tamime, A.Y. et al., *Yoghurt Science and Technology*, Pergamon Press, 1985, p. 393, for the reasons recited on pages 2-3 of the Office Action.

Huang discloses a frozen dessert composition that includes at least about 4 wt% milk protein, about 0.001 wt% to 18 wt% sweetening agent, such as sucrose, about 5 wt% to 80 wt% culture premix, about 6 wt% to 16 wt% partially hydrolyzed starch, about 0.01 wt% to 18 wt% butterfat, and 0.6% vanilla. As recognized in the Office Action, Huang does not disclose or even suggest salt. Claim 26 now recites the presence of salt. Huang also does not disclose or suggest the composition disposed on at least one layer of a biscuit, as recited by claim 26. This feature was previously recited in claim 37, which was not rejected over Huang. Thus, Huang does not disclose or even suggest each and every feature of the present claims, and cannot anticipate them. For these reasons, Applicants respectfully request that the rejection of claims 26-27, 29-34, and 36 under 35 U.S.C. § 102(b) be reconsidered and withdrawn.

Claims 26, 30-31, and 33-36 were rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,737,374 to Huber et al. ("Huber") for the reasons recited on page 3 of the Office Action.

Huber discloses a smooth textured soft frozen non-fat yogurt that includes 1.5 to 40% added milk solids, between 13% and 30% sweetening agent, about 3% to 14% yogurt powder, 3% to 14% maltodextrin, about 0.01% to 3.0% artificial flavoring agent, and about 0.01% to 0.15% salt. As recognized in the Office Action, Huber does not disclose or even suggest cream. Claim 26 now recites the presence of cream. Huber also does not disclose or even suggest the composition disposed on at least one layer of a biscuit, as recited by claim 26. This feature was previously recited in claim 37, which was not rejected over Huber. Thus, Huber does not disclose or even suggest each and every feature of the present claims, and cannot anticipate them. For these reasons, Applicants respectfully request that the

rejection of claim 26, 30-31, and 33-36 under 35 U.S.C. § 102(b) be reconsidered and withdrawn.

Claims 26, 30-31, 34, and 36 were rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 5,800,855 to Rosen ("Rosen"), as evidenced by U.S. Patent No. 5,145,697 to Cajigas ("Cajigas") for the reasons recited on page 4 of the Office Action.

Rosen discloses a cream composition that includes about 13% cream cheese, about 24.5% cream, about 19.4% milk, about 10.3% condensed skim milk, about 32.2% liquid can sugar (21.5% dry can sugar along with 10.7% water may be substituted), 0.5% of a stabilizing system (which may contain salt), and 0.1% vanilla extract (*See, e.g.,* Example 1, column 5, lines 40-52). The stabilizing system may further include carob bean gum, guar gum, or carrageenan. Rosen does not disclose or suggest the composition disposed on at least one layer of a biscuit, as recited by claim 26. This feature was previously recited in claim 37, which was not rejected over Rosen. Thus, Rosen does not disclose or suggest each and every feature of the present claims, and cannot anticipate them. For at least this reason, Applicants respectfully request that the rejection of claims 26, 30-31, 34, and 36 under 35 U.S.C. § 102(e) be reconsidered and withdrawn.

Claims 26, 29-36, and 38 were rejected under 35 U.S.C. § 103(a) as being obvious over Huang in view of Huber for the reasons recited on pages 4-5 of the Office Action.

As detailed above, Huang and Huber, individually, fail to disclose or suggest each feature of the claims, as amended. Huang and Huber also fail to disclose or suggest each feature when combined, since their combination does not provide any teaching of the composition disposed on at least one layer of a biscuit, as recited by claims 26 and 39. This feature was previously recited in claim 37, which was not rejected over this combination of references. Thus, even the combination of references does not disclose or suggest each feature of the present claims as is required to establish a *prima facie* case of obviousness. For these reasons, Applicants respectfully request that the rejection of claims 26, 29-36, and 38 under 35 U.S.C. § 103(a) be reconsidered and withdrawn.

Claims 26, 30-31, 33-36, and 38 were rejected under 35 U.S.C. § 103(a) as being obvious over Huber in view of U.S. Patent No. 5,202,146 to Singer *et al.* ("Singer") for the reasons recited on page 6 of the Office Action.

As detailed above, Huber does not disclose or suggest each feature of the present claims. Singer discloses a flavor delivery system for fat free foods that includes different amounts of heavy cream, while keeping the total fat of the food product under 1%.

Singer does not disclose or suggest the composition disposed on at least one layer of a biscuit, as recited by claims 26 and 39. This feature was previously recited in claim 37, which was not rejected over this combination of references. Thus, even the combination of references does not disclose or suggest each feature of the present claims as is required to establish a *prima facie* case of obviousness. For these reasons, Applicants respectfully request that the rejection of claims 26, 30-31, 33-36, and 38 under 35 U.S.C. § 103(a) be reconsidered and withdrawn.

Claims 26-32, 35, and 37-38 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 4,721,622 to Kingham et al. ("Kingham") in view of U.S. Patent No. 5,573,793 to Saintain ("Saintain") for the reasons recited on pages 7-8 of the Office Action.

Kingham discloses a food product with a bread-like casing having a filling, with an optional barrier layer (*See, e.g.,* Abstract). Kingham teaches a large variety of filling materials, including a filling of cream cheese, double cream, milk, ground onions, salt, spices, maize starch, gelatin, and water (Example 1); and yogurt, dried cream, dried onion, modified starch, salt, pepper, dextrose monohydrate, disodium dihydrogen pyrophosphate, fat, emulsifier, gelatin, water, cooked bacon, and grated cheddar cheese (Example 2).

Kingham fails to disclose or suggest a milk derivative (as recognized in the final Office Action mailed December 20, 2001) and sugar as recited by the present claims. Moreover, Kingham does not teach the aromatic products or texturizing agent of claims 33-34. Indeed, one of ordinary skill in the art would not necessarily have been motivated to substitute one amount of milk for a different amount of powdered milk. Furthermore, Kingham discloses a food product with a bread-like casing having a filling within the bread-like casing, *i.e.*, the food product of Kingham completely surrounds the filling. On the contrary, the present invention recites the cream filling disposed on a layer of biscuit, which is not disclosed or suggested by the bread-like casing around the filling. Also, Kingham fails to teach sugar, as presently recited, since it is directed to non-confectionery fillings.

Saintain fails to remedy the deficiencies of Kingham. Saintain discloses a food composition containing a cookie or chocolate shell having a dairy based filling that is fermented with live lactic acid bacteria. The filling may contain yogurt, sugars, milk proteins, and several other ingredients. Saintain does not disclose or suggest sour cream or dairy cream containing 25% to 45% of fatty substances or salt, as recited by the present claims. Saintain also does not disclose or suggest the composition disposed on at least one layer of a biscuit, as recited by claims 26 and 39. The Office Action also states that Saintain

teaches a sweet filling with high sugar and no salt, which would *teach away* from the inclusion of salt as presently recited and *teach away* from the non-confectionery fillings of Kingham. The Office Action cannot properly state that the combination of Kingham and Saintain teaches the features of the invention by using the salt of Kingham's filling and the sugar of Saintain's filling, since these cited references effectively teach that their fillings are mutually exclusive. For these reasons, no motivation existed for one of ordinary skill in the art to combine the Saintain sweetened confectionery-type filling with only part of Kingham's non-confectionery filling.

Also, there was no motivation in the cited art for one of ordinary skill in the art to combine the non-confectionery snack food product of Kingham with the cookie or chocolate shell composition of Saintain, as is also required to establish a *prima facie* case of obviousness. Only through a hindsight reconstruction of picking and choosing features from the disclosure of the present invention would one ever attempt to combine these disparate references. One of ordinary skill in the art would not have been motivated to combine Kingham's non-confectionery bacon and cheddar cheese, or the filling of Example 1, with the confectionery cookies having dairy filling taught by Saintain, for example, unless resort were improperly made to the Applicants' own teachings in the application to pick and choose ingredients required to obtain the Applicants' invention.

Moreover, one of ordinary skill in the art would not have reasonably expected to achieve success in combining such disparate products to provide a cream composition disposed on at least one layer of a biscuit, as presently recited. It would not have been reasonable to take Kingham's non-confectionery food product, remove various filling components, substitute various other components for those as to which both references are silent, and expect to successfully obtain the presently claimed invention.

Even if a motivation to combine and a reasonable expectation of success existed, the combination of Kingham and Saintain still fails to teach disposing the cream composition on at least one layer of biscuit—not to mention whether salt is to be *included* as per Kingham's high salt content or *completely avoided* per Saintain's teaching. Further, even if Kingham taught all features of the claim, which the Office Action concedes it does not, the transition language in claim 38 "consisting essentially of" specifically excludes various Kingham ingredients from the presently recited cream composition, as they would materially affect the novel features of the invention. This language specifically excludes the onions and bacon of Kingham that make it completely irrelevant to the cream composition of the present invention. Thus, Kingham has been explicitly excluded from claim 38 by the transition

language thereof, even if it were relevant. This transition language also specifically excludes added water that would be necessary to convert the milk derivative of the present invention to the milk disclosed by Kingham. The presence of moisture from other claimed components would at best provide some type of wet or pastry-textured powder, but would not be expected to be sufficient to provide milk. Indeed, too much water or the use of milk itself would have been expected to render the claimed biscuit layer undesirably soggy. Claim 46 recites the cream composition between two layers of biscuit, which is not taught by the cited references. At best, Kingham and Saintain teach either a casing or shell *inside* of which their fillings are disposed. The cited references, even in combination, fail to disclose or suggest separate layers of anything much less separate layers of biscuit between which the claimed cream composition is disposed. For these reasons, Applicants respectfully request that the rejection of claims 26-32, 35, and 37-38 under 35 U.S.C. § 103(a) be reconsidered and withdrawn.


Accordingly, applicants now believe all claims are in condition for allowance. Should the Examiner not agree with this position, a telephone or personal interview is requested to resolve any remaining issues and expedite allowance of this application.

A Continued Prosecution Application Request Transmittal, with provision for the required fee, is enclosed. A Petition for Extension of Time extending the time for responding to May 20, 2002, with provision for the required fee, is also enclosed.

No fee is believed to be due for this response. Should any fees be required, however, please charge such fees to Winston & Strawn Deposit Account No. 501-814.

Respectfully submitted,

5/20/02
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APPENDIX A: MARKED UP VERSION OF SPECIFICATION TEXT

At page 10, line 16:

The food composition has an A_w of 0.88 and contains living lactic acid bacteria at a concentration of 5×10^7 per gram of the food composition. After being chilled for 45 days, the food composition still contains living lactic acid bacteria at a concentration [over] of over 10^6 per gram of the food composition.

APPENDIX B: MARKED UP VERSION OF AMENDED CLAIMS

26. (Amended) A cream composition comprising a mixture of:
10% to 20% of a milk derivative;
8% to 30% of a sugar;
10% to 60% of a fermented dairy product;
0.01% to 35% of a texturizing agent;
[up] 0.01% to 25% of sour cream or dairy cream containing 25% to 45% of
fatty substances;
[up] 0.01% to 20% of an aromatic product; and
[up] 0.01% to 0.5% of salt;
wherein the cream composition is disposed on at least one layer of a biscuit.

38. (Amended) A cream composition consisting essentially of:
10% to 20% of a milk derivative;
8% to 30% of a sugar;
10% to 60% of a fermented dairy product;
0.01% to 25% of sour cream or dairy cream containing 25% to 45% of fatty
substances;
0.01% to 35% of a texturizing agent;
0.01% to 20% of an aromatic product; and
0.01% to 0.5% of salt;
wherein the cream composition is disposed on at least one layer of a biscuit.